IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Applicant:	Tomas Brodsky	**Examiner:**	John B. Strege
Serial No.:	10/772,892	**Art Unit:**	2624
Filed:	February 4, 2004	**Docket:**	22369 (H27809)
For:	SYSTEM AND METHOD FOR COUNTING CARS AT NIGHT	**Dated:**	January 26, 2009

Confirmation No.: 5359

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Sir:

In response to the Final Office Action dated September 26, 2008, Appellant submits the following pre-appeal brief request for review with a Notice of Appeal under 37 C.F.R. § 41.31 with a one month extension of time in the above-identified patent application.

CERTIFICATE OF ELECTRONIC FILING

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Dated: January 26, 2009

Jean-Paul Cass

REMARKS

Appellant submits that the final office action dated September 26, 2008 includes one or more errors and that the cited references do not disclose all of the elements of the independent claims.

There is a clear error in the Examiner's rejection at page 3, paragraph 2 of the Action. United States Published Patent Application No. 2006/0274917 to Ng *et al.* (hereinafter "Ng") does not inherently disclose or suggest independent Claim 1. Ng discloses a system for vehicle night detection that relies on peaks of intense light. See page 7, paragraph 125. The presence of a headlight is detected by deriving an intensity profile of the region of interest. This profile is performed along the entire traffic lane. From the profile, sharp peaks from the headlight can be detected and identified. Additionally, Ng discloses that the peak from a headlight reflection is much smoother relative from the headlight. Ng does not disclose or suggest any sequential detection using components of the headlights as claimed. There exists an error in the rejection of independent Claim 1 in that the claimed recognition zone corresponds to two sequential events, or (1) reflected light (received from reflection areas that are illuminated by narrower segments of higher intensity light) being diminished and (2) projected light (from the headlights) being received directly. Ng does not disclose or suggest a recognition zone corresponding to a segment of a field of view of the camera wherein (1) reflected light is received from reflection areas that are illuminated by narrower segments of higher intensity light being substantially diminished and (2) the projected light from the headlights is received directly.

The Final Office Action is incorrect where the Office claims that this feature is inherent at page 3, paragraph 2 of the Office Action. Nowhere in any reference does the reference disclose or suggest recognizing that the headlight can be split into narrow and broad

segments for detection purposes and this would not flow from Ng, which simply discloses that an intensity profile of the traffic lane is derived. Inherency is predicated on the fact that anticipation cannot be avoided merely because an element is undisclosed and unrecognized in the reference, but is necessarily present in the reference. To be necessarily present, one must show more than a mere probability or possibility of the inherent feature's existence. See Cont'l Can Co. v. Monsanto Co., 948 F.2d 1264, 1268, 20 USPQ2d, 1746, 1749 (Fed. Cir. 1991). The court held that an inherency question is not based on whether a prior art process inherently results in a claimed invention, but whether one of skilled in the art would read a prior art reference as inherently disclosing an invention. See Rosco, Inc. v. Mirror Lite Co., 304 F.3d 1373, 64 USPQ2d 1676 (Fed. Cir. 2002). One would not read Ng as having the claimed limitation because Ng specifically discloses looking at sharp peaks and dull peaks at one time interval as shown in FIG. 25 to determine which one of the peaks is a headlight and which of the other is merely a reflection at the same time. This intensity profile method of Ng can lead to errors. Appellant's Claim 1 is superior because it uses both (1) reflected light as being diminished and (2) projected light as being received directly to recognize a vehicle in a sequential manner. One of ordinary skill in the art would not read Ng as disclosing this sequential test. See Ng at page 7, paragraph 125. Secondly, the Examiner has not met the Office's burden for inherency. The Federal Circuit analyzes inherent disclosures on the basis of requiring an inherency to be "necessarily present" and not merely sometimes, occasionally, or possibly present. See Cont'l Can Co. v. Monsanto Co., 948 F.2d 1264, 1268, 20 USPQ2d, 1746, 1749 (Fed. Cir. 1991). M.P.E.P. § 2112 (8th ed. rev. 1, Feb. 2003) requires that the Examiner supply an Applicant either with a rationale for the inherent disclosure or evidence demonstrating the presence of the inherency. At page 4 of the Action, the Office merely cites to paragraphs 121 and 125 and states that these limitations are supported. This is insufficient and does not supply the Appellant with a

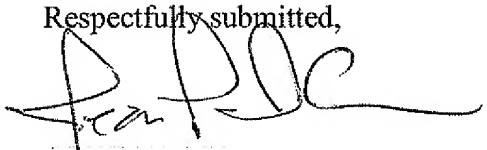
rationale for an inherent disclosure. The Office must provide a rationale that one of ordinary skill in the art would arrive at using (1) reflected light received from reflection areas that are illuminated by the narrower segments of higher intensity light being substantially diminished and (2) using the projected light from the headlights being received directly in a sequential manner from Ng at paragraphs 121 and 125. Currently, the Action is silent as to any rational that this would be necessarily present as required by Cont'l Can Co. v. Monsanto Co. At paragraph 125, Ng discloses sharp peaks attributed to the headlight, which can be identified. At paragraph 121, Ng discloses minimizing the false detection of the vehicle headlight by reflections and eliminating the reflected headlight as illustrated in FIG. 19. One would not read Ng as having the claimed limitation because Ng specifically discloses looking at sharp peaks and dull peaks at one time interval, to determine which one of the peaks is a headlight and which of the other is merely a reflection. There is no doubt Ng mentions both reflection and the presence of headlights at FIG. 25. In fact, the Appellant does not wish to "eliminate" the reflection as Ng does at paragraph 121, but to use both the occurrence of (1) a diminished reflection and (2) the directly received light being received directly in a sequential manner to provide vehicle detection. The inherency rejection is not properly supported, as the limitation is not necessarily present as one would "eliminate" the reflected light and not use the reflected light as claimed.

Finally, the Office is incorrect at page 3 of the Action where the headlight emits a broad segment and a narrow segment is shown in FIG. 3 of Ng. This limitation is not shown in FIG. 3, which merely is a photo of a traffic lane showing a non-homogenous background. Vehicles include headlights that are characterized as producing a broad segment of projected light and a narrower segment of higher intensity light. As can be seen in FIGS. 4A-4D of Appellant's specification, the broad segment is shown as angle H, while the narrower segment is

shown by angle B. There is no mention of splitting detection between these two narrow and broad segments as claimed in Ng.

There is a clear error in the Examiner's rejection at page 5 of the Action. Claim 12 is also patentable as Ng does not disclose or suggest a method of detecting a vehicle where the recognition zone corresponds to (1) reflected light received from a reflection area of the roadway that is illuminated by the narrower segment of higher intensity light being substantially diminished and (2) projected light being received directly. Ng also does not disclose or suggest distinguishing vehicles from reflections based on tracks of the illumination patterns in the series of images as in Claim 22. Ng discloses deriving an intensity profile in one dimension and that reflected light has duller peaks, which distinguish from the sharper peaks coming from the headlight. Ng also does not disclose or suggest independent Claim 37 in that Ng does not disclose or suggest distinguishing each illumination pattern based on a length of the one or more tracks. In contrast, Ng discloses deriving an intensity profile in one dimension and that reflected light has duller peaks, which distinguish from the sharper peaks coming from the headlight. Tracks denote a two dimensional detection. Thus, in view of the foregoing remarks, Appellant requests that the Office allow the patent application on the existing claims and reverse the final rejection.

Respectfully submitted,



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PRE-APPEAL BRIEF REQUEST FOR REVIEW

Docket Number (Optional)
22369 (H27809)

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Application Number	Filed
10/772,892	February 4, 2004

First Named Inventor
Tomas Brodsky

Art Unit	Examiner
2624	John B. Strege

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).
Note: No more than five (5) pages may be provided.

I am the

- [ ] applicant/inventor.
- [ ] assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)
- [x] attorney or agent of record. Registration number 46,605
- [ ] attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____

Jean-Paul Cass

Signature

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January 26, 2009

Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.

- [x] *Total of 1 forms are submitted.

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